

**The Prosecutor’s Manual Volume I**  
**Chapter 4**  
**Search Warrants**

**Table of Contents**

<b>I. Introduction .....</b>	<b>1</b>
<b>II. Advantages of Search Warrants.....</b>	<b>1</b>
A. A Common Sense Interpretation .....	1
B. Presumption of Validity .....	1
C. Burden of Proof on Defendant .....	1
D. Less Evidence to Uphold Search.....	1
E. Preference Given Doubtful or Marginal Warrants .....	1
F. Severability .....	2
G. Good Faith Exception .....	2
H. Applies to Named Evidence Only .....	2
I. Avoids Appeals.....	2
<b>III. Statutory Grounds for Issuance – Property to be Seized A.R.S. § 13-3912 .....</b>	<b>2</b>
A. Criminal Warrants .....	2
B. Administrative Warrants .....	2
<b>IV. Magistrate Defined A.R.S. § 1-215(13) .....</b>	<b>3</b>
<b>V. Jurisdiction .....</b>	<b>3</b>
A. Justice of the Peace .....	3
B. Officers.....	3
<b>VI. Issues in Drafting .....</b>	<b>3</b>
A. The Standard of Proof for Probable Cause.....	3
B. Arizona Cases.....	4
C. Throw in the Kitchen Sink .....	4
D. Reliability of the Informant.....	5
1. Citizen Informant .....	5
2. Crime Stop Callers.....	5
a. Presumed Reliable.....	5

b. Corroboration of Innocent Detail .....	5
3. Non-citizen Informants .....	6
E. Basis of Knowledge.....	6
1. Information Based on Personal Knowledge .....	6
2. When, Where, and How .....	6
F. Informant Identity Disclosure .....	6
<b>VII. Factors to Consider .....</b>	<b>7</b>
A. Specificity .....	7
1. Failure to be Specific .....	7
2. Details in Affidavit Save Warrant.....	7
3. Minor Description Mistakes .....	8
a. Address and Description of Residential Property .....	8
b. Description of Perpetrators .....	9
c. Description of Vehicles.....	9
d. Property to be Seized .....	9
e. Wrong Date .....	10
B. Nighttime Searches.....	10
1. Good Cause.....	10
2. Officer’s Belief .....	10
3. Positivity .....	10
C. False Statements: Necessity for Hearings .....	10
1. Errors Must Affect Validity of Warrant.....	11
2. Mere Negligence or Inadvertence .....	11
3. Must be Misconduct by the Affiant .....	11
4. Omission of Facts/Claims .....	12
5. Deceit to Obtain Facts for Warrant.....	12
D. Hearings to Add Innocent Detail.....	12
E. Connections and Inferences.....	12
F. If all else Fails.....	12
1. Good Faith Exception .....	12
2. Search Warrant Exceptions.....	13
3. Suppressed Evidence is still Impeachment .....	13

<b>VIII. Issues in Authorization.....</b>	<b>13</b>
A. Magistrate’s Failure to Sign the Warrant .....	13
B. Unrecorded Oral Testimony .....	13
1. Method .....	13
2. Failure to Record Oath Harmless.....	13
C. Failure to Administer the Oath.....	13
D. Quality and Quantity of Probable Cause.....	13
1. Deferral by Appeals Court.....	13
2. Staleness.....	14
3. Unusual Probable Cause .....	14
a. Dog Sniff.....	14
b. Hypnosis .....	14
c. For Defense Counsel .....	14
4. Address .....	14
E. Anticipatory or Delayed Execution Warrants.....	14
F. Evidence of Other State Crimes.....	15
<b>IX. Issues in Execution .....</b>	<b>15</b>
A. Delay .....	15
1. Dissipation of P.C. ....	15
2. Return of Warrant .....	15
B. Breaking and Entering to Execute .....	15
1. Knock and Announce.....	16
a. Necessity .....	16
b. Exceptions.....	16
C. Entry to Secure Premises.....	16
1. Length of Time .....	16
a. Sounds or Movement .....	16
b. Dangerous Occupants .....	17
2. Vacant Premises.....	17
3. Standing .....	17
D. The Search.....	17
1. Of Occupants .....	17

a. Frisk .....	17
b. Search.....	17
2. Of the Place.....	18
3. By Victims or Informants .....	18
4. Search or Detention of Visitors.....	18
<b>X. Telephonic Search Warrants .....</b>	<b>18</b>
A. Statutory Authorization .....	18
B. Procedure.....	18
C. Recording Requirements .....	18
<b>XI. Miscellaneous .....</b>	<b>19</b>
A. Electronic Surveillance Warrants.....	19
B. Defendant's Remedy .....	19
C. No Crime Scene Exception .....	19
D. Third Party Ride Alongs .....	19
<b>XII. Search Warrant Checklist: Mistakes to Avoid.....</b>	<b>19</b>
A. Introduction .....	19
B. Checklist.....	20
1. Name .....	20
2. Appropriate Grounds .....	20
3. Description.....	20
4. Particularity.....	20
5. Pre-printed Warrants.....	20
6. Probable Cause .....	20
a. Affiant's Experience .....	20
b. Affiant's Observations .....	20
c. Informants .....	20
d. Include all Possible Corroboration.....	21
e. Avoid Staleness.....	21
f. Check Attachments.....	21
g. Make Connections .....	21
7. How Drugs were Known .....	21
8. Conclusion .....	21

9. Proofread..... 21

10. Signatures..... 21

# **The Prosecutor's Manual Volume I**

## **Chapter 4**

### **Search Warrants**

#### **I. INTRODUCTION**

The purpose of this chapter is to assist the prosecutor in the preparation of a valid search warrant as well as provide some of the underlying case law to defend a search warrant in court.

#### **II. ADVANTAGES OF SEARCH WARRANTS**

Search warrants and affidavits have a preferred status allowing:

##### **A. A Common Sense Interpretation**

A common sense realistic, rather than technical, interpretation. *Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085 (1984); *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741 (1965); *State v. Summerlin*, 138 Ariz. 426, 675 P.2d 686 (1983); *State v. Hale*, 131 Ariz. 444, 641 P.2d 1288 (1982); *State v. Edwards*, 154 Ariz. 8, 739 P.2d 1325 (App. Div. 1 1986).

“Search warrants are presumed to be correct and should not be invalidated by a hypertechnical interpretation when a magistrate had probable cause to issue the warrant. Doubtful or marginal affidavits should be considered in light of the preference of validity accorded search warrants. Affidavits in support of search warrants should be interpreted in a commonsensical and realistic fashion.” *State v. Ault*, 150 Ariz. 459, 466-97, 724 P.2d 545, 552-53 (1986), citing *State ex rel. Collins v. Superior Court*, 129 Ariz. 156, 629 P.2d 992 (1981).

##### **B. A Presumption of Validity**

A presumption of validity. 17 A.R. S. Rules of Criminal Procedure, Rule 16.2(b); *Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085 (1984) (“deferential standard of review” on appeal); *Ault, supra*; *Search Warrants C-419847 and C-419848*, 136 Ariz. 175, 665 P.2d 57 (1983); *State v. Hadd*, 127 Ariz. 270, 619 P.2d 1047 (App. Div. 2 1980); *State v. Lopez*, 115 Ariz. 40, 563 P.2d 295 (App. Div. 2 1976).

##### **C. Burden of Proof on Defendant**

The presumption of validity from the warrant means that the defendant has the “burden to prove the invalidity of the search and seizure.” *Search Warrants C-419847 and C-419848*, 136 Ariz. 175, 176, 665 P.2d 57, 58 (1983); *State v. Rangel*, 12 Ariz.App. 172, 468 P.2d 623 (App. Div. 1 1970).

##### **D. Less Evidence to Uphold Search**

Where a search warrant is based on a magistrate's determination of probable cause (rather than an officer's), it will be upheld on the basis of less “judicially competent” evidence than is required to validate probable cause for a warrantless search. *State v. Smith*, 112 Ariz. 531, 537, 544 P.2d 213, 219 (1975); *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741 (1965).

##### **E. Preference Given Doubtful or Marginal Warrants**

Preference should be given to doubtful or marginal warrants. *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741 (1965); *State v. Ault*, 150 Ariz. 459, 724 P.2d 545 (1986). *State v. Superior Court*, 129 Ariz. 156, 629 P.2d 992 (1981); *State v. Torrez*, 112 Ariz. 525, 544 P.2d 207 (1975), cert. denied, 425 U.S. 916 (1976).

#### F. Severability

The trial court may redact invalid portions of an otherwise valid search warrant if it is “meaningfully severable.” Evidence seized pursuant to the invalid portions of the warrant will be suppressed. *State v. Roark*, 198 Ariz. 550, 12 P.3d 225 (App. Div. 1 2000).

#### G. Good Faith Exception

If officers are acting in good faith reliance on a search warrant, the search will be upheld even if it turns out that the warrant was invalid. *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984); *State v. Papineau*, 146 Ariz. 272, 705 P.2d 949 (App. Div. 2 1985); A.R.S. § 13-3925. See generally *State v. Bolt*, 142 Ariz. 260, 689 P.2d 519 (1984) (adopts *Segura*, companion case to *Leon*).

The good faith exception will not save a warrant which is based on illegally seized evidence. *State v. Britain*, 156 Ariz. 384, 385, 752 P.2d 37, 38 (App. Div. 2 1988); *State v. Hicks*, 146 Ariz. 533, 707 P.2d 331 (App. Div. 1 1985). See generally *State v. Moorman*, 154 Ariz. 578, 744 P.2d 679 (1987) (unnecessary to decide if good faith saved search extended beyond warrant).

#### H. Applies to Named Evidence Only

The protections and preferences given evidence apply only if the evidence was named in the search warrant. If the property is not named in the search warrant, the state must justify its seizure. *Search Warrants C-419847 and C-419848*, 136 Ariz. 175, 665 P.2d 57 (1983).

#### I. Avoids Appeals

In *State v. McGann*, 132 Ariz. 296, 645 P.2d 811 (1982), the Arizona Supreme Court said the deputy county attorney who told the police a search warrant was unnecessary was legally correct. The court said the deputy county attorney should have told police to get a warrant to avoid the appeals.

### III. STATUTORY GROUNDS FOR ISSUANCE - PROPERTY TO BE SEIZED A.R.S. § 13-3912

#### A. Criminal Warrants

Crime related property may be sought and seized. This includes property:

1. stolen or embezzled;
2. used or to be used as a means to commit a crime;
3. which tends to show a crime has been committed or that a particular person committed it; and
4. when the person is the subject of an outstanding arrest warrant.

#### B. Administrative Warrants

Property may be searched and inspected by an appropriate official in the interest of public health, safety or welfare if such inspection is authorized by law. A.R.S. § 13-3912 (5); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534 (1981).

Administrative searches of pervasively regulated industries may or may not need an administrative search warrant. The latest industry held to be pervasively regulated was automobile wrecking yards. *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636 (1987).

#### IV. MAGISTRATE DEFINED A.R.S. § 1-215(13)

"Magistrate" means an officer having power to issue a warrant for the arrest of a person charged with a public offense and includes the chief justice and judges of the supreme court, judges of the superior court, justices of the peace and police magistrates in cities and towns.

While any magistrate can issue a search warrant, a magistrate can also hear motions to contravene search warrants. *State ex rel. Milstead v. Melvin*, 140 Ariz. 402, 405, 682 P.2d 407, 410 (1984). This in effect can grant justices of the peace or city magistrates the power to hear motions to suppress in felony cases. The quick answer to such motions is to file Rule 16.1(d) contravention if the defendant tries to go in front of a different magistrate.

#### V. JURISDICTION

##### A. Justice of the Peace

Any justice of the peace can issue a search warrant for any place in the state (except upon an Indian on a reservation). *State v. Reed*, 120 Ariz. 58, 62, 583 P.2d 1378, 1382 (App. Div. 1 1978); *State v. Enriquez*, 115 Ariz. 342, 565 P.2d 522 (App. Div. 2 1977).

##### B. Officers "Peace officer" is defined

in A.R.S. § 1-215(23).

Any peace officer may serve a search warrant anywhere in the state (except upon an Indian on a reservation). *State v. LeMatty*, 121 Ariz. 333, 336-37, 590 P.2d 449, 452-53 (1979).

#### VI. ISSUES IN DRAFTING

The Supreme Court in *Gates v. Illinois*, 462 U.S. 213, 103 S.Ct. 2317 (1983), reemphasized the fluid nature of probable cause, rejecting the rather mechanical test used for many years.

*Aguilar v. Texas*, 378 U.S. 108, 114 S.Ct. 1509 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584 (1969), point out factors which may be relevant in convincing a magistrate that there is probable cause for the issuance of a warrant, but the two-prong test need not be satisfied. The basis of knowledge and the veracity of an informant may be relevant, but they are only two factors and may be shown in a great variety of ways.

##### A. The Standard of Proof for Probable Cause



The standard of proof for issuance of a warrant is "a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates v. Illinois*, 462 U.S. 213, 230-31, 103 S.Ct. 2317, 2328 (1969). There is no required intellectual framework. The magistrate must only "make a common-sense decision" based on the totality of the circumstances.

The emphasis is now on the totality of circumstances. A lack of evidence as to the reliability of an informant is not fatal. *Gates* involved a note from an anonymous tipster. Observation of the defendants confirmed parts but not all of the behavior predicted by the tipster.

An anonymous note said that the defendants 1) made their living from selling drugs; 2) openly admitted it; 3) had over \$100,000 worth of drugs in their home; 4) that their method of acquiring drugs involved trips to Florida; 5) that the wife periodically drove their car to Florida and left it to be filled with drugs; and immediately returned by plane; 6) that the husband would then fly to Florida and drive the car back; and 7) that a drug run would be made within a few days.

The tip proved to be only partially accurate. Mrs. Gates drove the car to Florida, the husband met her the following day and then both Gates, rather than only Mr. Gates were observed driving north (presumably towards their home in Chicago).

There were three discrepancies noted by the dissent. First, one spouse did not remain at home at all times, which went to the probability of the presence of a large value in drugs. Second, the wife and husband spent one night together in Florida, which was less suspicious than a distinct visit by each spouse. Third, the errors made it less reliable.

Justice White in a concurring opinion found the warrant valid under the *Aguilar/Spinelli* test and suggested that the flight to "an area known to be source of narcotics, the brief overnight stay in a motel, and apparent immediate return North" was inherently suspicious. The majority, however, ignored the discrepancies and the innocent nature of much of the Gates' activities. The majority opinion seems to eliminate any hint of a requirement of suspicious activity.

The approval of the use of corroborated innocent behavior to show probable cause is supported by *Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085 (1984). In *Upton*, an anonymous tipster informed the police that due to the arrest of a burglar three hours before, a fence would soon move his trailer containing large amounts of loot. There was little evidence to corroborate the tip. The only other indicia of reliability was that one officer thought he recognized the voice of the caller and the caller admitted to being the girlfriend of the arrested burglar. The court did not emphasize the identity to indicate that there was probable cause even if the caller lied about her identity.

### B. Arizona Cases

Arizona has adopted *Gates* retroactively. *State v. Espinosa-Gamez*, 139 Ariz. 415, 4119-20, 678 P.2d 1379, 1383-84 (1984). Arizona has also followed the reasoning of *Gates*' holding that officers may rely on hearsay when determining whether probable cause allows an investigatory stop. *State v. Lawson*, 144 Ariz. 547, 698 P.2d 1266 (1985).

A reviewing court will determine whether probable cause was sufficient in light of the information available to the officers at the time they acted. *State v. Burns*, 163 Ariz. 44, 785 P.2d 1232 (App. Div. 1 1989)

### C. Throw In The Kitchen Sink

Even though it's unnecessary to meet the two-pronged *Aguilar/Spinelli* test, it's a good idea to keep the prongs of that test in mind as part the totality of the circumstances test. The *Gates* court held that the elements “are better understood as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.” *Illinois v. Gates*, 462 U.S. 213, 233, 103 S.Ct. 2317, 2329 (1983).

Arizona has cases that upheld the validity of the search warrant under both standards. See *State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983), cert. denied 104 S.Ct. 2670. Even if some of the detail is incorrect, you need not hold a hearing on the validity of the warrant if exclusion of the incorrect details leaves enough facts for probable cause. *State v. Carter*, 145 Ariz. 101, 700 P.2d 488 (1985). If you attempt to meet both standards, the good faith exception should apply. *State v. Papineau*, 146 Ariz. 272, 705 P.2d 949 (App. Div. 2 1985).

#### D. Reliability Of The Informant

##### 1. Citizen Informants

Citizen informants, those who are just average citizens, are presumed to be credible if their name is recited in the affidavit. *State v. Lawson*, 144 Ariz. 547, 698 P.2d 1266 (1985); *State v. Summerlin*, 138 Ariz. 426, 675 P.2d 686 (1983); *State v. Diffenderfer*, 120 Ariz. 404, 586 P.2d 653 (1978); *State v. Coats*, 165 Ariz. 154, 797 P.2d 693 (App. Div. 1 1990); *State v. deBoucher*, 135 Ariz. 220, 660 P.2d 471 (App. Div. 2 1983); *State v. Harris*, 131 Ariz. 488, 642 P.2d 485 (App. Div. 2 1982) (non-professional citizen informant presumed reliable).

Likewise, crime victims are assumed to be credible. *State v. Rodgers*, 134 Ariz. 296, 655 P.2d 1348 (App. Div. 1 1982) (victim reliability need not be shown); *State v. Robinson*, 127 Ariz. 324, 620 P.2d 703 (App. Div. 2 1980), cert. denied 101 S.Ct. 1765, 451 U.S. 1044 (1981). See generally *State v. Edwards*, 154 Ariz. 8, 739 P.2d 1325 (App. Div. 1 1986) (reliability of victim unquestioned).

##### 2. Crime Stop Callers a.

###### Presumed Reliable

Anonymous citizens who phone in reports of crimes are presumed reliable, absent evidence of corrupt motive. *State v. Summerlin*, 138 Ariz. 426, 675 P.2d 686, 691 (1983); *State v. Turney*, 134 Ariz. 238, 655 P.2d 358 (App. Div. 1 1982) (crime stop informant “entitled to a somewhat greater measure of credibility than the usual police informant”); *State v. Sweet*, 143 Ariz. 289, 693 P.2d 944 (App. Div. 2 1984) (corroborated by sale of drugs to undercover officer). But see generally *State v. Castor*, 114 Ariz. 47, 559 P.2d 167 (App. Div. 1 1976).

###### b. Corroboration of Innocent Detail

Footnote 13 of *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 2335 (1983), noted that corroboration of innocent detail was sufficient; to require the police to corroborate by finding criminal activity imposed too high a standard for probable cause. Prior to *Gates*, the Arizona Court of Appeals held that corroboration of more than innocent detail was required. *State v. White*, 122 Ariz. 42, 592 P.2d 1308 (App. Div. 1 1979).

However, in the case which applied *Gates* retroactively, the Arizona Supreme Court said that the Court of Appeals suppressed because there was corroboration of only innocent details, and that in order for the

search to be upheld, Gates had to be applied retroactively. The only possible criminal corroboration was that the highway of the stop was a drug smuggling route. *Gates* (and *Ross*) were applied retroactively and the search was upheld. *State v. Espinosa-Gamez*, 139 Ariz. 415, 678 P.2d 1379 (1984).

### 3. Non-Citizen Informants

Informants who are not citizen informants may be shown to be credible. This may be accomplished *inter alia* by showing that the informant: a) gave prior verified reliable information or made controlled buy(s), *State v. Camargo*, 112 Ariz. 50, 537 P.2d 920 (1975), *State v. Vail*, 158 Ariz. 334, 335, 762 P.2d 621 (App. Div. 2 1988); or b) is a co-perpetrator who, against his penal and personal interest, gives a statement implicating another. *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075 (1971); *State v. Archer*, 23 Ariz.App. 584, 534 P.2d 1083 (App. Div. 1 1975).

#### E. Basis of Knowledge 1. Information Based on

##### Personal Knowledge

“An unreliable informant who lacks personal knowledge cannot provide probable cause.” *State v. Williams*, 184 Ariz. 405, 407, 909 P.2d 472, 474 (App. Div. 1 1995).

The informant's personal observations about illegal drugs in the defendant's possession were sufficient to support the underlying facts of the search warrant. *State v. Rubino*, 23 Ariz.App. 143, 147, 531 P.2d 188, 192 (App. Div. 1 1975).

##### 2. When, Where, and How

Arizona courts have also stated that, in addition to the "who" requirement of probable cause (reliability), an affidavit may also reflect when, where, and how the informant got his information.

Appellant had the burden to make a factual showing either that the informant was a witness to the crime or that he had material facts about the issue of guilt. Appellant failed to make any showing that an undisclosed or unidentified person witnessed the criminal acts. He also failed to show that an anonymous informant could give exculpatory evidence. . . . [W]e find that disclosure was properly denied.

*State v. Bloomer*, 156 Ariz. 276, 281, 751 P.2d 592, 597 (App. Div. 2 1987) (internal citations omitted).

#### F. Informant Identity Disclosure

Rule 15.4(b)(2) provides that the disclosure of an informant's identity is not required where the informant “will not be called to testify” or “where disclosure would result in substantial risk to the informant or to his operational effectiveness, provided the failure to disclose will not infringe the constitutional rights of the accused.” See *State v. Williams*, 156 Ariz. 232, 751 P.2d 548 (App. Div. 2 1987) (“the record supports the invocation of the [Rule 15.4(b)(2)] privilege.”).

To outweigh the public policy upholding the government's privilege against disclosing the identity of a confidential informant, the defendant must make a factual showing that the informant could testify on the merits of the case. *State v. Altmirano*, 116 Ariz. 291, 292-93, 569 P.2d 233, 234-35 (1977).

The court must weigh evidence supporting each side's allegations. *State ex rel Collins v. Riddel*, 133

Ariz. 376, 651 P.2d 1201 (1982). See *State v. Dixon*, 125 Ariz. 442, 610 P.2d 76 (App. Div. 2 1980).

Another jurisdiction held a defendant alleging entrapment was not entitled to disclosure of the informant only if the informant would provide a complete defense. Repeated cajoling was not entrapment. *State v. Enriquez*, 725 P.2d 1384 (Wash.App. 1986) (good collection entrapment cases).

## VII. FACTORS TO CONSIDER

### A. Specificity

The Fourth Amendment of the United States Constitution requires that the place to be searched and the "things to be seized" be described with some specificity.

#### 1 .Failure to be Specific

Failure to describe with specificity the property to be seized or the place to be searched may vitiate the warrant. *Marcus v. Search Warrants*, 367 U.S. 717, 81 S.Ct. 1708 (1961); *Steele v. United States*, 267 U.S. 498, 45 S.Ct. 414 (1925); *State v. Alder*, 146 Ariz. 125, 704 P.2d 255 (App. Div. 2 1985); *State v. Boniface*, 26 Ariz.App. 118, 546 P.2d 843 (App. Div. 1 1976) (wrong address and no description).

Conclusory statements about the existence of probable cause are not permissible. The warrant must include a statement explaining the underlying facts that support the conclusion. *Otel H. v. Barton*, 208 Ariz. 312, 93 P.3d 512 (App. Div. 1 2003).

The use of a phrase such as "and any other evidence" does not automatically invalidate a search warrant if interpreted to authorize a search for evidence related to the specific crime of which the defendant is suspected. However, if interpreted broadly to permit search and seizure of a broad range of items, the language in the affidavit/warrant will render it defective. *State v. Moorman*, 154 Ariz. 578, 583, 744 P.2d 679,684 (1987). See also *State v. Lavers*, 168 Ariz. 376, 814 P.2d 333 (1991) ("any and all evidence related to").

In a corporate tax evasion case, the search warrant permitted seizure of nearly every computer file and document in the business and was invalidated for lack of specificity. *United States v. Kow*, 58 F.3d 423 (9<sup>th</sup> Cir. 1995).

In a burglary case, officers obtained a search warrant for stolen items, describing them generally as "items taken usually have been purses, wallets and jewelry." The court held this was not sufficiently particular. *State v. Robinson*, 139 Ariz. 240, 241, 677 P.2d 1348, 1349 (App. Div. 2 1984).

#### 2.Details in Affidavit Save Warrant

Always incorporate the affidavit into the search warrant by reference, staple them together, take them to the scene and have the officers read both before serving them. The failure to do so may render the warrant invalid. *Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284 (2004).

Thus if a mix-up occurs, and a description is left out of the warrant, the evidence is still admissible. *State v. Moorman*, 154 Ariz. 578, 744 P.2d 679 (1987) (officers went a little beyond warrant when the only thing left in room was the toilet, but harmless). "A defective description in the warrant may be saved by an adequate description in the affidavit." *Id.* at 583, 744 P.2d at 684. (officer must take affidavit and refer to it). The actual attachment may not be a requirement, the Arizona Supreme Court

did not require it in *Moorman*, but said some courts did, citing *State v. Woratzek*, 130 Ariz. 499, 501-02, 637 P.2d 301, 303-04 (App. Div. 2 1981).

If a search will take place in a multi-unit structure, such as an apartment building, be sure to identify and describe the particular unit to be searched unless the entire premises is under suspicion for illegal activity. *State v. Adams*, 197 Ariz. 569, 5 P.3d 903 (App. Div. 1 2000) (search of theater owner's residence on second floor over theater invalid); *State v. Burns*, 163 Ariz. 44, 46, 785 P.2d 1232, 1232 (App. Div. 1 1989). In *Burns*, the search of the entire house was upheld even though the defendant occupied only one bedroom because he had access to other bedrooms based on a common key. This is known as the "community living unit" exception. Otherwise, the warrant for the entire premises may have been invalidated unless:

(1) the multiple occupancy character of the building was not known and could not have been discovered by reasonable investigation; (2) the discovery of the multiple occupancy occurred only after the police had proceeded so far that withdrawal would jeopardize the search; and (3) upon discovery of the multiple occupancy, reasonable efforts were made to determine which subunit is most likely connected with the criminality under investigation and to confine the search accordingly.

*Id.* at 46-47, 785 P.2d at 1234-35.

### 3. Minor Description Mistakes

Minor mistakes of descriptions, however, will not invalidate the warrant.

#### a. Address and Description of Residential Property

When writing the warrant, the more you can put in the better. That way if the house numbers are inaccurate, for instance, but the description fits only one house, the warrant will probably stand.

A warrant that described in detail the defendant's trailer and its location but mistakenly listed the name of the trailer park sufficiently described the place to be searched. *State v. Coats*, 165 Ariz. 154, 797 P.2d 693 (App. Div. 1 1990).

The incorrect license plate number on a search warrant otherwise accurately describing the defendant's mobile home was "inconsequential." *State v. Vaughn*, 163 Ariz. 200, 204, 786 P.2d 1051, 1055 (App. Div. 1 1989).

A search warrant for the premises and buildings described as Star Rte. Box 64A, Castle Hot Springs, Arizona was valid even though it failed to describe defendant's home/bus, where the bus was not visible from the road nor the air. *State v. White*, 145 Ariz. 422, 701 P.2d 1230 (App. Div. 1 1985).

A warrant containing the wrong lot number was valid since the defendant's trailer was clearly distinguishable from his parent's trailer. *State v. Madsen*, 125 Ariz. 346, 609 P.2d 1046 (1980).

Court upheld a search warrant with an incorrect street address where the warrants contained not only the erroneous street address, but also a written description or name of the premises to be searched. *State v. Morgan*, 120 Ariz. 2, 583 P.2d 889 (1978).

In the warrant, the building was described as white with a tin roof but was actually gray with a tin roof. The error was not fatal. *State v. Jung*, 19 Ariz.App. 257, 506 P.2d 648 (App. Div. 2 1973).

### b.Description of Perpetrators

A warrant identifying the defendant as “Jim, a black male” failed to describe the person to be searched with adequate detail. *State v. Hamilton*, 173 Ariz. 196, 840 P.2d 1061 (App. Div. 1 1992).

An affidavit which contained the defendants' first names, physical descriptions, and their precise locations was a precise enough description, even though it did not include the defendants' last names. *State v. Albert*, 115 Ariz. 354, 565 P.2d 534 (App. Div. 1 1977).

Issuance of a warrant to search people who had not yet arrived was upheld where there was probable cause to believe they would arrive "within the district in a reasonable time." *United States v. Goff*, 681 F.2d 1238 (9th Cir. 1982).

It is unreasonable to require officers to name those to be searched in an "after hours" house because the customers may vary from day to day. Therefore, a warrant requesting to search everyone on the premises is valid. (Careful in applying this case, everyone there was probably committing/aiding a crime.) *State v. Henkel*, 356 N.W.2d 774 (Minn. App. 1985).

### c.Description of Vehicles

A search warrant describing the vehicle to be searched by the wrong model year was a “minor error in description” that did not invalidate the warrant. *State ex rel Flournoy v. Wren*, 108 Ariz. 356, 365, 498 P.2d 444, 453 (1972).

### d.Property to be Seized

“[T]he requirement of particularity is not so rigid as to mandate that every item seized by the police must be specifically listed in the warrant before seizure is authorized. When deciding whether a warrant is too general, the trial court must consider the nature of the property sought to be recovered.” *State v. Ray*, 185 Ariz. 89, 92-93, 912 P.2d 1318, 1321-22 (App. Div. 1 1988). In *Ray*, a search warrant issued in an investigation of a chop shop listed broad classes of major vehicle component parts. The warrant and its accompanying 33 page affidavit describing the probable cause to believe police would find stolen auto parts was upheld.

It was unnecessary for the search warrant to describe the marks on dishes that the victim recognized when she bought her own goods back from a peddler. *State v. Edwards*, 154 Ariz. 8, 739 P.2d 1325 (App. Div. 1 1986) (peddler fingered the defendant as the source of the stolen goods).

A description of loot stating only "[T]he items taken have usually been purses, wallets, and jewelry" was insufficient. *State v. Robinson*, 139 Ariz. 240, 677 P.2d 1348 (App. Div. 2 1984). But see *State v. Alder*, 146 Ariz. 125, 704 P.2d 255 (App. Div. 2 1985). (Pictures of nude women and pornographic books and magazines sufficient for child molestation warrant.)

Bomb-type materials were listed in the warrant. The officers were justified in seizing bomb-related materials such as batteries. *State v. Adamson*, 136 Ariz. 250, 665 P.2d 972 (1983).

The warrant failed to specifically describe insecticides, plant food, and small potted plants in detail but the court upheld the warrant. *State v. Woratzeck*, 130 Ariz. 499, 637 P.2d 301 (App. Div. 2 1981).

The failure to describe the obscene material to be seized by its title did not render the warrant invalid where the location of the material was described and the warrant was served shortly after undercover officers saw it prior to getting the warrant. *State v. Bartanen*, 121 Ariz. 454, 457, 591 P.2d (1979).

#### e. Wrong Date

The warrant said on 8/14/80, the victims told police about a molestation which occurred on 8/29/80. This was found to be an obvious typographical error (crime occurred 7/29/80), and the warrant was upheld. *State v. Superior Court*, 129 Ariz. 156, 629 P.2d 992 (1981).

### B. Nighttime Searches

#### 1. Good Cause

Nighttime searches (which begin between 10:00 p.m. and 6:30 a.m.) are permitted only if authorized by the warrant after good cause has been shown. *State v. Jackson*, 117 Ariz. 120, 571 P.2d 266 (1977) (defendants were selling at all times of night and day); *State v. Cox*, 110 Ariz. 603, 607, 522 P.2d 29 (1974) (vehicle might not arrive until nighttime); *State v. Wilson*, 25 Ariz.App. 49, 540 P.2d 1268 (App. Div. 2 1975) (warrant procured at noon did not authorize service at night).

The best explanation of "good cause" is found in *State v. Adamson*, 136 Ariz. 250, 665 P.2d 972 (1983). In *Adamson*, the police worked all day investigating and drawing up the warrant, took it to the judge's home to get it signed, then served it. The circumstances of the "egregious crime" [bombing of newspaper reporter] and the facts recited above, justified issuance of the nighttime warrant.

#### 2. Officer's Belief

An officer's statement that drug sales take place during the night, without more, is insufficient to justify a nighttime search. *State v. Rypkema*, 144 Ariz. 585, 698 P.2d 1304 (App. Div. 1 1985). On the other hand, if sales have been observed at night, good cause has been shown. The alleged sales need not be proven to be sales; evidence of typical sales behavior is sufficient. *State v. Eichorn*, 143 Ariz. 609, 694 P.2d 1223 (App. Div. 1 1984).

#### 3. Positivity

When a nighttime search is necessary, a greater degree of "positivity" is required other than that the crime-related property is located in the place to be searched. *State v. Wren*, 108 Ariz. 356, 365, 408 P.2d 444 (1972); *State v. Adams*, 18 Ariz.App. 292, 501 P.2d 561 (1972).

### C. False Statements; Necessity for Hearings

A defendant who contests the validity of a search warrant is not automatically entitled to a hearing. Before the hearing will be held, the defendant must make "a substantial preliminary showing that an affidavit in support of a search warrant contains a falsehood which was made intentionally, or with reckless disregard for the truth, and that the falsehood was material and necessary to the finding of probable cause." *State v. Bolt*, 142 Ariz. 284, 287, 689 P.2d 543, 546 (App. Div. 2 1983) (the defendant did not petition for review on this issue); *United States v. Figuerra*, 750 F.2d 232 (2nd Cir. 1984) (hearing not required by the defendant's bare assertions that events didn't happen; didn't meet burden of "substantial preliminary showing").

If the defendant is granted a hearing, he has the burden of proving these allegations by a preponderance of the evidence. *State v. Carter*, 145 Ariz. 101, 700 P.2d 488 (1985). If the defendant makes the substantial preliminary showing, and succeeds in meeting his hearing burden of proving reckless disregard or perjury, then the material is excised, and the question is whether probable cause still exists.

One way to defeat the defense claim is assume for the sake of argument that all of the defense allegations are correct and argue that probable cause is still established. *Carter* is an example of a case in which this tactic succeeded.

To meet the burden of proof that the warrant is invalid, the defense must show several things.

### 1. Errors Must Affect Validity of Warrant

This proposition has been around a long time. *State v. Buccini*, 167 Ariz. 550, 810 P.2d 178 (1991); *State v. Carter*, 145 Ariz. 101, 700 P.2d 488 (1985); *State v. Martin*, 139 Ariz. 466, 679 P.2d 489 (1984).

“When the alleged false statements are excised, the warrant will be upheld if the remainder of the affidavit is sufficient to establish probable cause.” *State v. Warren*, 121 Ariz. 306, 309, 589 P.2d 1338, 1341 (App. Div. 2 1979); *State v. Diffenderfer*, 120 Ariz. 404, 586 P.2d 653 (App. Div. 2 1978); *State v. Moses*, 24 Ariz.App. 305, 537 P.2d 1363 (App. Div. 2 1975); see also *State v. Raboy*, 24 Ariz.App. 586, 540 P.2d 712 (App. Div. 1 1975).

### 2. Mere Negligence or Inadvertence

Mistakes due to negligence or inadvertence are not grounds for invalidating the search warrant. *State v. Carter*, 145 Ariz. 101, 700 P.2d 488 (1985); *State v. Martin*, 139 Ariz. 466, 679 P.2d 489 (1984). Unfortunately, these cases take the easy way out by excising the “falsehoods” and still finding probable cause.

### 3. Must be Misconduct by the Affiant

“The real issue involved in the determination of an issue such as probable cause is not whether an informant lied to the officers but whether the affiant is truthful in his recitation of what he was told and whether that information was credible and reliable.” *State v. Keener*, 110 Ariz. 462, 464, 520 P.2d 510, 512 (1974).

“[T]he fact that an informant has given false information to a police affiant will not serve to vitiate the existence of probable cause absent a showing that the officer/affiant knew or had reason to know that the informant was lying and, therefore, the false information cannot serve to invalidate the warrant.” *State v. Pike*, 113 Ariz. 511, 513, 557 P.2d 1068, 1070 (1976). See also *State v. Vandever*, 23 Ariz.App. 331, 334, 533 P.2d 91, 94 (App. Div. 1 1974) (the alleged falsehood was unknown to the officers at the time and did not affect the integrity of the search warrant)

In *State v. Claxton*, 122 Ariz. 246, 594 P.2d 112 (1979), an officer stated in his affidavit that property was currently in possession of the defendant when in fact the officer did not know whether or not the property had yet been delivered to him by the informant. The court suppressed the evidence because of the officer's reckless disregard for the truth.

In *State v. Payne*, 25 Ariz.App. 454, 544 P.2d 671 (App. Div. 1 1976), the affiant said the informant had observed narcotics in the defendant's possession when that was untrue. The evidence was



suppressed. See also *State v. Williams*, 111 Ariz. 175, 526 P.2d 714 (1974) (falsehoods in the affidavit); *Yuma County Attorney v. McGuire*, 109 Ariz. 471, 512 P.2d 14 (1973) (magistrate failed to sign); *State v. Vandever*, 23 Ariz.App. 331, 533 P.2d 91 (1975) (affidavit false); *State v. Moses*, 24 Ariz.App. 305, 537 P.2d 1363 (App. Div. 2 1975) (affidavit false; reliability irrelevant if corroboration); *State v. Raboy*, 24 Ariz.App. 586, 540 P.2d 712 (App. Div. 1 1975) (false test; whether officer or informant lying peripheral).

#### 4. Omission of Facts/Claims

Officers seeking a search warrant for an investigation into a stolen vehicle did not have to tell the magistrate that the defendant claimed to have legal title to the vehicle. The failure to include defendant's claim was not misconduct. *State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996).

Defendant cannot challenge a search warrant's omission of facts unless he can show that the omission/falsehood was a deliberate or reckless act. Defendant could not challenge a search warrant with a hospital discharge summary prepared after the affidavit as it was not probative about the issue of what the officer was told. *State v. Lopez*, 174 Ariz. 131, 847 P.2d 1078 (1992).

#### 5. Deceit to Obtain Facts for Warrant

A warrant will not be declared invalid because deceit was used to obtain information used in the warrant. *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982). This decision is common sense. Deceit must be used to obtain information in a lot of cases; what drug dealer is going to knowingly sell drugs to an undercover officer, so the officer can go get a search warrant?

##### D. Hearings to Add Innocent Detail

Arizona recently intimated that details indicating defendant's innocence may be added. *State v. Carter*, 145 Ariz. 101, 700 P.2d 488 (1985) (and probably should be in the original warrant). Make sure the details concerning innocence are material. If defendant is allowed to add details concerning defendant's innocence, the state should be allowed to add details showing defendant's guilt. *United States v. Williams*, 737 F.2d 594 (7th Cir. 1984) (also evidence showed good faith mistakes; defendant failed to meet his burden of proof).

##### E. Connections and Inferences

One of the attacks defendants sometimes launch is on whether there was probable cause to believe the material would be found in the place to be searched. Inferences are sufficient to establish the connections. *United States v. Poland*, 659 F.2d 884 (9th Cir. 1981) cert. denied 454 U.S. 1059 (1982); See generally *State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983), cert. denied 104 S.Ct. 2670.

##### F. If All Else Fails

If the court invalidates the search warrant, there may be other avenues by which you can use evidence seized therein.

##### 1 .Good Faith Exception

Just when the defense is happy at having jumped through all your hoops, point out the ring of fire to them. Even if the warrant was invalid for reasons other than police misconduct, the evidence is still

admissible under the A.R.S. § 13-3925 statutory good faith exception and case law. *State v. Papineau*, 146 Ariz. 272, 705 P.2d 949 (App. Div. 2 1985).

## 2. Search Warrant Exceptions

Finally, if defendant jumps through all the search warrant hoops including the ring of fire, he is not done with the circus. Now is time to move to the search warrant exceptions found in the Search and Seizure chapter. Just don't go there easily, because there you have the burden of proof. *State v. Harding*, 137 Ariz. 278, 670 P.2d 383 (1983) (even if warrant bad, search ok, defendant lacked reasonable expectation of privacy in car he stole).

## 3. Suppressed Evidence is Still Impeachment

Evidence seized under an invalid warrant can be used for impeachment. *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1972 (1980); *State v. Menard*, 135 Ariz. 385, 661 P.2d 649 (App. Div. 2 1983).

## VIII. ISSUES IN AUTHORIZATION

### A. Magistrate's Failure to Sign the Warrant

A magistrate's failure to sign a warrant is a technical errors or oversight that does not invalidate a search warrant under the state constitution or case law. *Yuma County Attorney v. McGuire*, 109 Ariz. 471, 512 P.2d 14 (1973). See also *State v. Williams*, 111 Ariz. 175, 526 P.2d 714 (1979).

### B. Unrecorded Oral Testimony

#### 1. Method

Testimony used to support probable cause must be "recorded on tape, wire, or comparable method." A.R.S. § 13-3914. Unrecorded oral testimony cannot be used to cure a deficient affidavit. *State v. Robertson*, 111 Ariz. 427, 531 P.2d 1134 (1975); *State v. Boniface*, 26 Ariz.App. 118, 546 P.2d 843 (App. Div. 1 1976) (address correction).

#### 2. Failure to Record Oath Harmless

However, a failure to record the oath will not vitiate the warrant. *State v. Mead*, 120 Ariz. 108, 584 P.2d 572 (App. Div. 2 1978).

### C. Failure to Administer the Oath

Failure to administer the oath may invalidate the warrant. *State v. Boniface*, 26 Ariz.App. 118, 546 P.2d 843 (App. Div. 1 1976) (a factor), but if it was administered but just not recorded the warrant will not fall. *Mead, supra*. If it was administered, but just not recorded, the warrant will not fall. *Id.*

### D. Quality and Quantity of Probable Cause

#### 1. Deferral by Appeals Court

The court of appeals will rarely question a magistrate's assessment of probable cause unless as a matter of the law the statements in the affidavit cannot constitute probable cause. *State v. Martin*, 139 Ariz. 466,

679 P.2d 489 (1984) (real close, deferred to magistrate); *State v. O'Brien*, 22 Ariz.App. 425, 528 P.2d 176 (App. Div. 2 1974).

## 2. Staleness

Where it is reasonable to believe that the items which are the subject of the search warrant are still on the premises to be searched, the search warrant is valid. *State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983), cert. denied 104 S.Ct. 2670 (items taken in contract killings look like robbery); *State v. Kasold*, 110 Ariz. 563, 521 P.2d 995 (1974); *State v. Cox*, 110 Ariz. 603, 522 P.2d 29 (1974).

For example, when the subject of the search is business records, a time delay of several weeks or even months between when the informant saw the criminal evidence and when he reported it may not create staleness. *Kasold, supra*. In the area of stolen property, it has been held that property seen by a reliable informant long before the issue of a search warrant was not stale information. *United States v. Barfield*, 507 F.2d 53 (5th Cir. 1975) (40 days); *State v. Smith*, 122 Ariz. 58, 593 P.2d 281 (1979) (5-9 months with some corroboration).

On the other hand, narcotics, which are subject to rapid consumption and disposal, allow less delay in obtaining a warrant. However, the Supreme Court has allowed information dated Nov. 20, 1976 to support an affidavit secured on Jan. 25, 1977, because of the continuous narcotic sales pattern revealed in the information in the affidavit. *State v. Hale*, 131 Ariz. 444, 641 P.2d 1288 (1982). See *State v. Watson*, 113 Ariz. 218, 550 P.2d 89 (1976) (week old); *State v. Camargo*, 112 Ariz. 50, 537 P.2d 920 (1975) (72 hours for narcotics o.k.).

## 3. Unusual Probable Cause

### a. Dog Sniff

A narcotics dog alerting can be probable cause. *State v. Morrow*, 128 Ariz. 309, 625 P.2d 898 (1981).

### b. Hypnosis

Statements by a hypnotized witness can be used to establish probable cause. Corroboration helps. *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982).

### c. For Defense Counsel

Although it would have been better to make the warrant conditional upon the happening of a specified event, the appellate court upheld seizure of defendant's letters from his attorney's briefcase. The lawyer was under a court order to pick the letters up from the judge after the state lost an appeal for production of the letters via a subpoena *duces tecum*. *Mehrens v. State*, 138 Ariz. 458, 675 P.2d 718 (App. Div. 1 1983).

## 4 Address

The officer's sworn statement that the defendant lived there was sufficient proof of defendant's address in *State v. Rodriguez*, 145 Ariz. 157, 700 P.2d 855 (App. Div. 1 1984), rejected on other grounds by *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996).

## E Anticipatory or Delayed Execution Warrants

"A Search Warrant is, by definition, an anticipatory authorization." *Ybarra v. Illinois*, 444 U.S. 85, 102, 100 S.Ct. 338, 348 (1979).

There must be probable cause at the time the affidavit is presented to believe a crime has been committed. A.R.S. § 13-3912. *State v. Vitale*, 25 Ariz.App. 37, 530 P.2d 394 (App. Div. 1 1975) (warrant obtained in anticipation that defendant would receive television from informant was insufficient); *State v. Berge*, 130 Ariz. 135, 634 P.2d 947 (1981) (warrant for defendant's house invalid, since the package of drugs had not been delivered to defendant's house at the time the police got the warrant).

An anticipatory or delayed execution warrant is the only practical way that a warrant can be obtained to search a moving automobile. "As long as the magistrate is fully and fairly apprised of the facts, it is reasonable to issue a warrant to be served at some time not unreasonably distant for a crime ... that is in progress or it is reasonable to assume will be committed in the near future." *State v. Cox*, 110 Ariz. 603, 608, 522 P.2d 29, 34 (1974).

An anticipatory warrant that alleges probable cause exists to search a house because police are going to control deliver a package containing contraband is insufficient. *State v. Crowley*, 41 P.3d 618 (App. Div. 2 2001).

The best idea course of action when seeking an anticipatory warrant is to establish that a crime has been committed and (to) condition the warrant upon the happening of a specific event. *Mehrens v. State*, 138 Ariz. 458, 675 P.2d 71 8(App. Div. 1 1983).

#### F Evidence of Other State Crimes

Arizona can issue search warrants to search Arizona for evidence of crimes committed in other jurisdictions. *State v. Heylmun*, 147 Ariz. 97, 708 P.2d 778 (App. Div. 2 1985).

### IX. ISSUES IN EXECUTION

#### A. Delay

##### 1. Dissipation of P.C.

Even if the informant is credible and his information is from personal knowledge, the probable cause may dissipate if the information is not acted upon in a timely manner. *State v. Hutton*, 110 Ariz. 339, 519 P.2d 38 (1974) (officer failed for 14 hours to act on informant's tip that the defendant was holding heroin).

##### 2. Return of Warrant

A search warrant must be executed and returned to the magistrate within five days. A.R.S. § 13-3918. *State v. Tillery*, 107 Ariz. 34, 481 P.2d 271 (1971) (seizure upheld where warrant was executed but not returned within statutory period).

#### B. Breaking and Entering to Execute

A.R.S. § 13-3916 provides that an officer may break into "building premises or vehicle" to execute a warrant only after knocking, announcing and waiting a reasonable time.

## 1 Knock and Announce

### a. Necessity

An officer who fails to knock and announce prior to forcible entry will vitiate the search and seizure. *State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001); *State v. Chagnon*, 115 Ariz. 178, 564 P.2d 401 (App. Div. 1 1977) (failure to announce); *State v. Mendoza*, 104 Ariz. 395, 454 P.2d 140 (1969) (failure to knock or announce); *State v. LaPonsie*, 136 Ariz. 73, 664 P.2d 223 (App. Div. 2 1982) (simultaneous announcement with entry of open door insufficient; officer must wait in order to fulfill purpose of rule). It doesn't matter whether the door is shut, partially open or wide open; officers must knock and announce prior to entering. *LaPonsie* at 74, 664 P.2d at 224.

### b. Exceptions

A.R.S. § 13-3915 permits a magistrate to authorize a “no knock” search warrant “on reasonable showing that an announced entry to execute the warrant would endanger the safety of any person or would result in the destruction of any of the items described in the warrant.”

The safety of someone is in peril. See *State v. Smith*, 123 Ariz. 231, 599 P.2d 187 (1979).

A resident is outside, sees the officer and ignores him by shutting the door in his face. *State v. Love*, 123 Ariz. 157, 598 P.2d 976 (1979); *State v. Davis*, 119 Ariz. 529, 582 P.2d 175 (1978).

The Arizona Supreme Court held that “substantial evidence” is required to demonstrate exigent circumstances existed to justify forcible entry. *State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

## C. Entry to Secure Premises

In Arizona, absent exigent circumstances, police may not enter a place to be searched and secure the location in anticipation of a search warrant. *State v. Bolt*, 142 Ariz. 260, 689 P.2d 519 (1984). The Supreme Court in *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380 (1984), chose not to address the constitutionality of such practices. The Arizona Supreme Court, meanwhile, accepted the exclusionary rule set out in *Segura, supra*, but rejected “securing” as a matter of state law. The majority considered *Segura*, to be nothing more than an application of the inevitable discovery rule.

Officers may prevent a person from entering the premises if they are waiting for a search warrant to arrive and have reason to fear that the person may destroy evidence if allowed to enter unaccompanied. The detention should be brief. *Illinois v. McArthur*, 531 U.S. 326, 33 1-333, 121 S.Ct. 946, 950 (2001).

## 1 Length of Time

Officers can forcibly enter the premises to execute a search warrant if they first knock and announce their presence and are either refused admittance or receive no response within a reasonable time. A.R.S. § 13-33916(B)(1), (2). The length of time an officer must wait after announcement depends upon the circumstances.

### a Sounds or Movement

Less delay is required if there is evidence that lead officers to believe that evidence is being destroyed; *State v. Papineau*, 146 Ariz. 272, 705 P.2d 949 (App. Div. 2 1985) (5-10 seconds not too short; were seen approaching, heard rustling noises); *State v. Dixon*, 125 Ariz. 442, 610 P.2d 76

(App. Div. 2 1980) (a few seconds when officers heard occupants scurrying about); than when there is no indication within of attempted destruction. *State v. Bates*, 120 Ariz. 561, 587 P.2d 747 (1978) (3-5 seconds too short when no movement); *State v. Cohen*, 191 Ariz. 471, 957 P.2d 1014 (App. Div. 1 1998).

Officers did not violate the knock and announce rule by entering through the front door while another officer held residents at gunpoint through the back door (for his own safety) because the residents were still free to tell the officers at the front door to come in. *State v. Wright*, 131 Ariz. 578, 643 P.2d 23 (App. 1982).

NOTE: In *Dixon, supra*, the officers entered within a few seconds of knocking and announcing, yet they were too late to save the evidence. The only way the evidence was saved was police had previously disconnected the trailer's sewer hoses. *Dixon* is a good case to cite if your officers only waited a few seconds before entering.

b      Dangerous Occupants

If occupants of the premises are dangerous, officers may wait less time prior to entry. *State v. Bates*, 120 Ariz. 561, 563, 587 P.2d 747 (1978) (implied).

2. Vacant Premises

Officers did not have to knock and announce before cutting the lock securing the gate of a chain link fence surrounding the yard of the house to be searched. *State v. Sanchez*, 128 Ariz. 525, 627 P.2d 676 (1981). See *Commonwealth v. McDonnell*, 516 A.2d 329 (Pa. 1986) (unnecessary to announce at porch door).

3. Standing

A defendant who was not present when a search warrant was served on his home lacked "standing" to contest an alleged violation of the knock and announce requirements. *State v. Papineau*, 146 Ariz. 272, 705 P.2d 949 (App. Div. 2 1985); *United States v. Silva*, 247 F.3d 1051, 1058-59 (9<sup>th</sup> Cir. 2001); *Mena v. City of Simi Valley*, 226 F.3d 1031, 1035 n. 2 (9<sup>th</sup> Cir. 2000).

D.      The Search

1      Of Occupants

a. Frisk

An officer may frisk any person present if "[i]t is reasonably necessary to protect himself or others from the use of any weapon which may be concealed upon the person...." A.R.S. § 13-3916 (E)(1).

An officer may not frisk a person present unless he can specifically articulate why he was afraid that the person he frisked was armed. *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338 (1979).

b. Search

An officer may search any person present if "[i]t reasonably appears that property or items enumerated in the search warrant may be concealed upon the person." A.R.S. § 13-3916 (E)(2).

An officer may not search a person who is merely present when, after conducting a frisk, the officer knows that the person has no weapon and knows that the person is not named in the warrant. *State v. Mendez*, 115 Ariz. 367, 565 P.2d 873 (1977).

## 2. Of the Place

Areas may be searched if they are within the place described in the warrant and could conceivably contain items reflected in the warrant.

Crime-related property, not named in the warrant but discovered in plain view during the search, may be seized. *Horton v. California*, 496 U.S. 128, 135, 110 S.Ct. 2301, 2307 (1990); *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982).

An officer who searches areas or inspects property not named in the warrant will cause any evidence obtained from that property to be suppressed. *State v. Smith*, 122 Ariz. 58, 593 P.2d 281 (1979).

If officers see a weapon in the place to be searched, they may temporarily seize it without probable cause for officer safety purposes. *State v. Rodriguez*, 205 Ariz. 392, 71 P.3d 919 (App. Div. 2 2003).

"Searches of the place include places reasonably connected to the premises, like a sewer hose on a trailer". *State v. Dixon*, 125 Ariz. 442, 610 P.2d 76 (App. Div. 2 1980).

## 3. By Victims or Informants

Both informants and victims can accompany the police when the police serve the warrant. *State v. Edwards*, 154 Ariz. 8, 739 P.2d 1325 (App. Div. 1 1986) (victim); *State v. Woratzeck*, 130 Ariz. 499, 637 P.2d 301 (1981) (victims); *State v. Scigliano*, 120 Ariz. 6, 583 P.2d 893 (1978)(informants).

## 4. Search or Detention of Visitors

Visitors may not be detained unless police have articulable reasons for the detention and search of visitors at the place to be searched. While the warrant is being served, absent articulable reasons justifying the search or detention of visitors, only the occupants may be detained while the warrant is being served. *State v. Carrasco*, 147 Ariz. 558, 711 P.2d 1231 (App. Div. 1 1985) (two hours too long).

# X. TELEPHONIC SEARCH WARRANTS

## A. Statutory Authorization

Arizona (and a few other states) have statutorily authorized telephonic search warrants. A.R.S. § 13-3914(C).

## B. Procedure

To get a telephonic search warrant, the affiant is placed under oath over the phone. The affiant then records his information on the search warrant and affidavit. If the judge finds that probable cause is present, he authorizes the officer to sign the judge's name on a duplicate original warrant.

## C. Recording Requirements

The most important aspect of the telephonic warrant procedure is that everything must be recorded. In one case, after properly obtaining a warrant and then arriving at the residence where the warrant was to be served, the officers discovered that the address on the warrant was incorrect. The officers then called the judge to correct the address. The Court of Appeals ruled that the officer's failure to be placed under oath or record the conversation vitiated the warrant. *State v. Boniface*, 26 Ariz.App. 118, 546 P.2d 843 (App. Div. 1 1976).

However, the failure to prepare an original search warrant, to certify the telephone conversation, to include citations in the duplicate and failure to include the time of execution were all technicalities which did not invalidate the warrant. *State v. Hadd*, 127 Ariz. 270, 619 P.2d 1047 (App. Div. 2 1980).

## XI. MISCELLANEOUS

### A. Electronic Surveillance Warrants

Electronic surveillance warrants contain additional requirements too lengthy to discuss here. If you have to draw one up, read the statutes carefully, then read *State v. Olea*, 139 Ariz. 280, 678 P.2d 465 (App. Div. 1 1983); *State v. Hale*, 131 Ariz. 444, 641 P.2d 1288 (1982); and *State v. Politte*, 136 Ariz. 117, 664 P.2d 661 (App. Div. 2 1982). *Politte* upholds the constitutionality of the Arizona statutes.

In an interesting twist, Arizona admitted wiretap evidence seized by Canadians during a Canadian investigation even though it allegedly violated the federal electronic surveillance statutes. The electronic surveillance was proper under Canadian law. *State v. Nieuwenhuis*, 146 Ariz. 477, 706 P.2d 1244 (App. Div. 2 1985).

### B. Defendant's Remedy

If someone aggrieved by a search warrant wants their property returned, their remedy is a civil appeal. *Greehling v. State*, 135 Ariz. 498, 662 P.2d 1005 (1982). As was noted earlier, any magistrate may hear a motion to return property. *State ex rel Milstead v. Melvin*, 104 Ariz. 402, 682 P.2d 407 (1984). Make sure your case officer and your civil attorneys know to tell you if a motion to suppress is filed. Try a Rule 16.1(d) counter motion to transfer the hearing back to the issuing judge.

### C. No Crime Scene Exception

Police found a dead body upon entering a house and began searching the rest of the house without a warrant. The Supreme Court found the warrantless search unlawful. *Flippo v. West Virginia*, 528 U.S. 11, 120 S.Ct. 7 (1999).

### D. Third Party Ride Alongs

The United State Supreme Court held that bringing a third party (in this case, the media) with police while executing a search warrant violates the Fourth Amendment if they do not aid in the execution of the warrant. This would, however, permit a crime victim to assist in the execution of a warrant to identify stolen items, for example. *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692 (1999).

## XII. SEARCH WARRANT CHECKLIST: MISTAKES TO AVOID

### A. Introduction



Many search warrants are quashed because of simple errors or omissions that are made during the preparation of the warrant and affidavit. These errors can be avoided if care and attention are given to the preparation of these documents.

It is frustrating when an otherwise valid search warrant is invalidated because of a careless mistake or oversight in its preparation. This section will provide a checklist to help in the preparation of a mistake-free warrant.

## B. Checklist

### 1. Name

Make certain the affiant's name appears on the face of the affidavit and warrant in the appropriate blank.

### 2. Appropriate Grounds

Check the appropriate statutory grounds for issuance in the blanks provided on the warrant and affidavit forms.

### 3. Description

Describe the location, vehicle, and person to be searched with sufficient particularity. The description should be identical in both the search warrant and affidavit, and incorporate each other by reference.

### 4. Particularity

Describe the items to be seized with sufficient particularity. The description should be identical in both the search warrant and affidavit.

### 5. Pre-printed Warrants

Make certain that all blank spaces in pre-printed forms are properly filled in. Make certain that all inapplicable language on pre-printed forms is crossed out. Read the forms carefully.

### 6. Probable Cause

Prepare the "Statement of Probable Cause."

#### a. Affiant's Experience

Set forth the identity, experience and expertise of affiant. The affiant's expert opinion may be necessary to explain certain observations made by the affiant, to explain certain street terms mentioned in the affidavit, to provide reasons for believing contraband is at a certain location, or to justify nighttime service. The affiant's opinion may not have much weight unless the affiant's expertise and experience is first established.

#### b. Affiant's Observations

Set forth the personal observations of the affiant.

#### c. Informants

Set forth information received from informants. Establish reliability and express information in a factual

manner reflecting personal knowledge of the informant.

d. Include all Possible Corroboration

e. Avoid Staleness

Make certain that the information set forth is clear and current. Avoid staleness. Update old information or explain why it is still accurate.

f. Check Attachments

Make certain all attachments and exhibits are complete, legible, and clearly labeled.

g. Make Connections

Be certain that the affidavit "connects up" the suspect with the location to be searched, the suspect with the items sought, the crime with the items sought, etc. For example, if the affiant can show the suspect committed a robbery and wants to search his residence, the affiant must show how he or she knows the suspect lives at a particular residence, i.e., connect the suspect with the residence through utility bills, surveillance, informants, etc.

7. How Drugs Were Known

Some affidavits state that an informant observed heroin inside a location. Often, however, the affidavit does not establish how the informant knew that the item observed was, in fact, heroin. Therefore, the affidavit should set forth facts establishing the informant's familiarity or expertise in recognizing heroin:

Your affiant conducted an examination of the informant and determined that the informant is a user of heroin and is familiar with the appearance of heroin and the manner in which heroin is packaged.

8. Conclusion

Set forth the reasoning and conclusions of the affiant as based upon the information set forth in the affidavit. The affiant should conclude that the items sought are at or on the premises, vehicles and persons to be searched.

Incorporate the affidavit into the warrant by reference, and vice versa.

9. Proofread

Look particularly for transposed or incorrect numbers. Also, if the documents have been typed by a clerk or stenographer, be certain no words, lines, interlineations, pages, etc., have been left out.

10. Signatures

Remember, the magistrate must sign and date both the affidavit and the warrant. Be certain the date is correct and the signatures appear on the correct lines. Also, the affiant must sign the affidavit. Check all signatures and dates before leaving the magistrate's court or residence.

Copyright July 23, 2010

Arizona Prosecuting Attorney's Advisory Council  
1951 W. Camelback Rd., Ste. 202  
Phoenix, AZ 85015